UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

1621 ROUTE 22 WEST OPERATING COMPANY, LLC d/b/a SOMERSET VALLEY REHABILITATION & NURSING CENTER,

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Employer,

*

and

NLRB Case No. 22-RC-13139

1199 SEIU UNITED HEALTHCARE WORKERS EAST, NEW JERSEY REGION,

*

Petitioner.

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EMPLOYER'S MOTION FOR RECONSIDERATION OF THE EMPLOYER'S EXCEPTIONS TO THE HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS AND NLRB'S DECISION AND CERTIFICATION OF REPRESENTATIVE

I. REQUEST FOR RECONSIDERATION AND STAY OF DECISION AND CERTIFICATION OF REPRESENTATIVE

The Employer hereby requests that the NLRB reconsider the Employer's Exceptions to the Hearing Officer's Report and Recommendations on Objections and the NLRB's Decision and Certification of Representative based on the grounds that Member Becker should have been recused and should not have participated as a decision-maker on this case. The reasons for the Employer's request regarding Member Becker's participation are set forth below.

The Employer further requests that the NLRB reconsider the Employer's Exceptions to the Hearing Officer's Report and Recommendations on Objections and the NLRB's Decision and Certification of Representative and sustain not only Objections 1

and 2¹ based on the rationale proffered by Member Hayes in his dissenting opinion, but also sustain certain other Objections, specifically Objections 5, 6 and 7 (relating to errors and omissions by the NLRB Agent conducting the election that undermined the integrity and secrecy of the voting process), Objections 4 and 12 (relating to impermissible election-day communications by the Union), Objections 3 and 13 (relating to impermissible electioneering by election observers for the Union), and Objection 11 (relating to the Union's creation of an improper impression of surveillance as to who voted in the election), and set aside the election results. The NLRB's failure to address the aforementioned fundamental issues affecting elections was clearly erroneous for the reasons set forth below.

Finally, the Employer requests that the NLRB's Decision and Certification of Representative be stayed pending the outcome of this Motion for Reconsideration.

II. BACKGROUND OF CASE

On July 22, 2010, 1199 SEIU United Healthcare Workers East, New Jersey Region ("Union") filed its Petition with Region 22 of the NLRB seeking a representation election among the employees of 1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation & Nursing Center ("Employer"). An election was held on September 2, 2010, at which the tally of ballots showed 38 votes cast for representation by the Union and 28 votes cast against the Union. On September 9, 2010, the Employer timely filed Objections to the Conduct of the Election. Thereafter, a hearing was conducted over 11 days in October and November 2010. On January 19, 2011, the

¹ Although the NLRB's Decision only specifically references Objection 1, the decision appears to encompass Objection 2 as well.

Hearing Officer issued her Report recommending that all of the Employer's Objections be overruled. On February 28, 2011, the Employer timely filed its Exceptions and Brief in Support of Exceptions to the Hearing Officer's Report and Recommendations on Objections ("Exceptions Brief"). On August 26, 2011, the National Labor Relations Board ("NLRB") issued its Decision and Certification of Representative. Chair Wilma B. Liebman and Member Craig Becker issued the Decision and Certification of Representative on behalf of the NLRB upholding the Hearing Officer's Report and Recommendations. Member Brian E. Hayes dissented with regard to Objection 1 and the NLRB's finding that the election would not be set aside. Member Pearce was recused and did not participate.

III. FACTS AND ARGUMENT

A. Member Becker's Failure to be Recused was in Error

Members of the NLRB are bound by the Standards of Ethical Conduct for Employees of the Executive Branch set forth in Title 5 of the Code of Federal Regulations. 5 CFR Part 2635. The relevant section provides, in part:

Section 2635.101 Basic obligation of public service.

. . .

(b) General principles

. . .

(8) Employees shall act impartially and not give preferential treatment to any private organization or individual.

. . .

(14) Employees shall endeavor to avoid any actions creating the appearance they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the

law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

Member Becker is a former long-time, high-ranking employee of SEIU, most recently serving as its Associate General Counsel. In that role, he has advised and advocated for the International Union as well as its local affiliates on numerous cases. By way of example, a search compiled through the case database housed on LexisNexis reveals that Member Becker has represented numerous SEIU locals in a wide variety of cases. Notably, Member Becker was affiliated counsel in the following cases: Service Employees Int'l Union, Local 2000 v. NLRB, 2008 U.S. App. LEXIS 23636, No. 07-1424 (D.C. Cir. 2008) (SEIU Local 2000); Guardsmark, LLC v. NLRB. 475 F.3d 369 (D.C. Cir. 2007) (SEIU Local 24/7); First Healthcare Corp. v. NLRB, 344 F.3d 523 (6th Cir. 2003) (SEIU Local 399); Stanford Hosp. & Clinics v. NLRB, 325 F.3d 334 (D.C. Cir. 2003) (SEIU Local 715); Beverly Health & Rehab. Services, Inc. v. NLRB, 317 F.3d 316 (D.C. Cir. 2003) (SEIU District 1199P); Service Employees Int'l Union. AFL-CIO, CLC, Local 525 v. NLRB, 52 Fed. Appx. 357 (9th Cir. 2002) (SEIU Local 525): Avante at Boca Raton, Inc., 54 Fed. Appx. 502 (D.C. Cir. 2002) (SEIU Local 1115); Beverly Health & Rehab. Services, Inc. v. NLRB, 297 F.3d 468 (6th Cir. 2002) (SEIU Local 585); NLRB v. Beverly California Corp., 25 Fed. Appx. 427 (7th Cir. 2001) (SEIU District 1199II and District 1199P); A've v. Service Employees Int'l Union, 24 Fed. Appx. 326 (6th Cir. 2001) (SEIU Local 526 M); NLRB v. Simon DeBartelo Group, 241 F.3d 207 (2nd Cir. 2001) (SEIU Local 32B-32J); Gen'l Service Employees Union, Local 73 v. NLRB, 230 F.3d 909 (7th Cir. 2000) (SEIU Local 73); NLRB v. Hilliard Development Corp., 187 F.3d 133 (1st Cir. 1999) (SEIU Local 285); Beverly Enterprises, Inc. v. Trump, 182 F.3d 183 (3rd Cir. 1999) (SEIU Local 585); and Service Employees Int'l

Union, Local 102 v. County of San Diego, 60 F.3d 1346 (9th Cir. 1994) (SEIU Local 102).

As the foregoing extensive list demonstrates, Member Becker not only represented the SEIU at the international level, but also was intimately involved in numerous cases at the local level. Further, the Local involved in the instant case, 1199 SEIU United Healthcare Workers East, New Jersey Region, is one of the largest – if not the largest – SEIU locals. Notably, of the approximately 1.9 million members listed on the SEIU International's 2010 LM-2, almost 20% (approximately 350,000 members).² are 1199 SEIU United Healthcare Workers East members. Additionally, according to its 2010 LM-2, 1199 SEIU United Healthcare Workers East contributed almost \$40 million to the SEIU International in per capita taxes in 2010. Accordingly, it is highly unlikely that as Associate General Counsel for the SEIU, Member Becker had no dealings with a division the size and magnitude of 1199 SEIU United Healthcare Workers East. Assuming arguendo that Member Becker had no dealings with this SEIU division, at a minimum, the sheer size of this division coupled with its significant monetary contributions to the International create such an appearance of loss of impartiality to a reasonable person such that Member Becker should have been recused from participating in this case. Member Becker's failure to do so was clearly erroneous and should be reconsidered.

² The 2010 LM-2 for 1199 SEIU Healthcare Workers East, New Jersey Region reports 343,498 members.

- B. The NLRB's Failure to Address Numerous Exceptions to the Hearing Officer's Report was Clearly Erroneous
 - 1. The NLRB Erroneously Failed to Address Significant Election Irregularities Which Raised Serious Doubts About the Integrity and Secrecy of the Election (Objections 5, 6, and 7)

Significant election irregularities occurred on the day of the election that undermined the integrity and secrecy of the voting process.³ Specifically, on the day of the election, the NLRB Agent arrived late and was not organized or prepared for the election. She improperly used an incomplete voting booth kit that failed to afford appropriate privacy to voters. Notably, the voting shield utilized by the NLRB Agent was constructed to be used with a base as evidenced by the notches cut into the bottom of the shield; however, the NLRB Agent improperly failed to utilize the base.⁴ Moreover, the improperly utilized voting shield moved throughout one voting session such that its opening was turned, facing and visible to the election observers sitting directly across from it in the small room in which the election took place. The testimony of some witnesses was that the backs, arms, and shoulders of voters were exposed while they were marking their ballots, while other testimony established that voters felt their votes were not private. Notably, more than one employee testified that the observers in the room could see them mark their ballots.

³ The facts supporting the Employer's position are detailed in the Employer's Exceptions Brief on pages 2-19.

⁴ Because the voting shield was used improperly, the notches at the bottom of the shield created open gaps through which the inside of the shield could be seen, thus compromising the secrecy of the voting process. Moreover, the sides or "wings" of the shield were not stabilized when it was used without its base unit, thereby allowing the sides to swing open, exposing the voters' ballots and hands during their process of marking their ballots.

Employees also testified that while the polls were open, the Union's observer was manipulating her cell phone in a manner that gave the appearance she was texting, the door to the voting room was open and people immediately outside the door were talking loudly, several people were allowed in the small room used for voting at the same time, and one voter even answered her cell phone while she was at the cardboard shield marking her ballot – conduct which the NLRB Agent failed to correct. Additionally, the NLRB agent asked one of the observers if a voter put her ballot in the ballot box after voting and another employee testified that the ballots were placed on the table for employees to pick up, rather than each employee being handed a single ballot.

In sum, the NLRB Agent failed to comply with the NLRB's Rules and Regulations, Case Handling Manual, and the Stipulated Election Notice, as well as prior NLRB precedent dealing with similar situations. The Hearing Officer improperly ignored and/or misconstrued the record evidence on these issues and the NLRB erroneously failed to address any aspect of these serious errors and omissions of the NLRB Agent in the conduct of the election as well as the NLRB case law requiring that an election tainted by such conduct be set aside. Significantly, the NLRB's case law clearly establishes that elections should be set aside where "voting arrangements could have led employees to believe they were being observed as they voted." See Columbine Cable Co., 351 NLRB 1087, 1087 (2007). The NLRB's failure to address this issue in its Decision was erroneous and should be reconsidered.

⁵ The NLRB Agent told the voting employee who answered her phone that she could not have her cell phone in the room *after* being prompted to do so by one of the observers.

2. The NLRB Erroneously Failed to Address the Union's Impermissible Electioneering (Objections 3, 4, 11, 12, and 13)

Union representatives engaged in impermissible electioneering through telephone calls, voicemails and text messages and/or other electronic communications by telling employees that they knew which employees had or had not voted. Specifically, Union organizer Brian Walsh sent a text message to voters on the day of the election while polls were open telling voters that the Union was winning. Further, Walsh admittedly sent "a lot" of voters text messages on the day of the election including while the polls were open.

Additionally, both Walsh and Union organizer Jean Venette placed numerous telephone calls to voters on the day of the election. During these phone calls, one employee was told that it looked like the Union was winning while another was told that Venette "knew" the employee had not yet voted. The numerous phone calls, voicemails, and text messages from the Union's organizers on the day of the election and while the polls were open interfered with the free choice of voters under the test set forth in *Brinks, Inc.,* 331 NLRB 46 (2000) (citing *Boston Insulated Wire & Cable Co.,* 259 NLRB 118 (1982), *enforced,* 703 F.2d 876 (5th Cir. 1983)).

Significantly, the foregoing conduct by the Union created an impression that the Union was improperly keeping a list of employees who voted, gave the impression of surveillance, and informed employees that the Union knew it was winning the election

⁶ The facts supporting the Employer's position are detailed in the Employer's Exceptions Brief on pages 36-50.

before the polls closed on election day.⁷ The numerous telephone calls and text messages by Union organizers in conjunction with the Union's election observer's apparent use of her cell phone in the voting room created circumstances under which voters reasonably could have the impression that the Union was keeping a list of not only who had voted, but also how they had voted. The Hearing Officer's finding to the contrary is in complete disregard of undisputed record evidence and the NLRB's failure to address this issue in its Decision was erroneous and should be reconsidered.

IV. CONCLUSION

For all of the foregoing reasons, the Employer respectfully requests that the NLRB reconsider the Employer's Exceptions to the Hearing Officer's Report and Recommendations on Objections and the NLRB's Decision and Certification of Representative entered in this matter on August 26, 2011. The Employer's Objections should be sustained, the results of the election conducted on September 2, 2010 should be set aside, and a second election should be held in an environment that allows employees to exercise their free choice and cast their votes by secret ballot in deciding whether or not to be represented by the Union.

⁷ As fully argued in the Employer's Exceptions Brief, the Union's roving election observer also engaged in impermissible electioneering while serving in her official role, conduct which was identified in Objections 3 and 13.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 9th day of September 2011, the foregoing pleading was filed via electronic filing with:

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and served via e-mail and Federal Express upon:

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